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Supreme Court of the United States

October Term, 1974

No. 73-1471

UNITED STATES and
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

—v.—

NEW JERSEY STATE LOTTERY COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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UNITED STATES and

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On Writ of Certiorari To The United States Court of Appeals For The Third Circuit

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus [1/]

The American Civil Liberties Union is a non-profit, non-partisan organization

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1/ This brief is filed with consent of the parties. The letters of consent have been filed with the Clerk of the Court.

of 250,000 members engaged solely in defense of the Bill of Rights. Of all the rights protected by the Bill of Rights, the Union has always placed special emphasis on the freedoms of speech and of the press protected by the First Amendment. Those rights are violated in this case by the terms of 18 U.S.C. §1304 which forbids the broadcasting of "any advertisement of or information concerning any lottery . . . ." We believe that that statute, as construed in this case to prohibit the broadcasting each week of the winning lottery number in the New Jersey lottery, is unconstitutional, as the United States Court of Appeals held below, 491 F.2d 219 (1974).

Summary of Argument

I. The First Amendment forbids adoption of the petitioner's central claim that speech which "promotes" an activity "which government may properly discourage or outlaw", may itself be suppressed.

II. Scarcity of broadcast frequencies and the licensing scheme justified by that scarcity permits some governmental regulation of broadcasters which the first amendment would not permit in the case of the print media. Cf. National Broadcasting Co. v. United States, 319 U.S. 190 (1943), to Miami Herald Publishing Co. v. Tornillo, 42 U.S.L.W. 5098. Thus, the fairness doctrine and Section 315, do not prohibit

broadcasters from airing any type of information or opinion, but only require that competing opinions also be broadcast. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969). But broadcast speech, like any speech, can be suppressed, if at all, only if it falls within one of the exceptions to the First Amendment. The government in this case relies on the commercial speech exception. But as that exception is defined in Pittsburgh Press v. Human Relations Commission, 413 U.S. 376 (1973), particularly in relation to the prohibitions of the First Amendment, the information involved here cannot be said to be commercial speech because it is broadcast as news, because it relates to a lottery which is lawful under state law, and because it does not involve fraudulent or deceptive marketing practises.

Finally Section 1304, as interpreted by the FCC and the Second Circuit in New York State Broadcasters v. United States, 414 F.2d 990 (2d Cir. 1969), cert. denied 396 U.S. 1061 (1970), is impermissibly vague for it fails adequately to distinguish between "items having only limited news value that directly promote a lottery", and "ordinary broadcast journalism." Winters v. New York, 333 U.S. 507 (1948).

A R G U M E N T

Introduction

The question before the Court is whether 18 U.S.C. §1304, to the extent it prohibits the broadcasting as news of "any . . . information concerning any lottery" is unconstitutional, either on its face or as applied by the Federal Communications Commission ("FCC" or "the Commission").

Relying on the Second Circuit's decision in New York State Broadcasters Assn. v. United States, 414 F.2d 990 (2d Cir. 1969), cert. denied, 396 U.S. 1061 (1970), the FCC held that §1304 prohibits broadcasters from announcing as news the winning numbers in legal state lotteries and other information "having only limited news value"2/ and "directly promoting a lottery."3/

2/ Appendix to Petition for Writ of Certiorari, hereafter cited as "Pet. App.", at 20a.

3/ Id. at 21. The FCC, reaffirming its 1970 Supplemental Declaratory Ruling, 21 FCC 2d 846 (1970), listed the following information which it considers both promotional and of only limited news value and which therefore would violate §1304 if contained in a radio or television station's news reports: "Announcements (unpaid) of the places where lottery tickets may be purchased, where, how and when winning tickets will be drawn, the amount of prizes, and how the proceeds of the sales of lottery tickets are and will be distributed." Pet. App. at 20a.

By judgment here under review, the Third Circuit en banc unanimously set aside the Commission's order on the ground that the agency "misconstrued the congressional mandate" because nothing in §1304

> was intended to permit the exercise by the FCC of control over editorial decisions of broadcast journalists. On the contrary as 47 U.S.C. §326 4/ makes clear, Congress expected the FCC's actions to be consistent with the first amendment (Pet. App. 5a).

4/ (Footnote not in original.) Section 326 provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

The court below summarized its constitutional analysis as follows:

> The first amendment makes clear that it is beyond the competency of any governmental agency to determine, a priori, that any item of information is, for any news medium, not news (Pet. App. 7a).

5/

Petitioners contend that both the words and the legislative history of Section 1304 belie any Congressional intention to exclude news coverage from that statute's prohibitions and, accordingly, "[i]f the present [FCC] ruling contravenes Section 326, it must be because it 'interfere[s] with the right of free speech guaranteed by the First Amendment'"(S.G.Br. 17). We agree with this formulation of the legal question before the Court; the issue is purely constitutional. Accordingly, this brief discusses only the First Amendment implications of Section 1304 and the FCC's interpretation of that statute.

We suggest that the "lottery information" ban of Section 1304 violates the

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5/ Hereinafter the Brief submitted by the Solicitor General on behalf of petitioners United States of America and Federal Communications Commission is cited as "S.G. Br. __" and petitioners are generally referred to as "the Government."

First Amendment's free press guarantee by curtailing broadcasters' journalistic discretion to determine what is newsworthy and how to report the news. 6/ The judicial 7/ and administrative 8/ attempts to limit the scope of the statutory prohibition to information of only "limited news value" which primarily "promotes" lotteries cannot transform censorship into permissible government regulation; rather, they only perpetuate censorship by replacing an absolute news ban with a qualified prohibition which is at once vague and overbroad. Accordingly, as the facts of the instant case demonstrate, the statutory ban on broadcasting "lottery information" must be invalidated. 9/

6/ The court below held that "[t]he FCC ruling imposes a small prior restraint. It is, nonetheless, a prior restraint upon dissemination of information of interest, on the day of the lottery, to perhaps 58% of New Jersey's adult population."(Pet. App. 5a). Cf. Near v. Minnesota, 283 U.S. 697 (1931).

7/ New York State Broadcasters Association, supra.

8/ Supplemental Declaratory Ruling, supra.

9/ The court below apparently decided as a matter of statutory interpretation that the FCC is barred by 47 U.S.C. §326 from apply-

ing 18 U.S.C. §1304 to any news programming or other programming which is not paid commercial advertising. But this is far from clear. The court concluded its opinion with the following statement: "Possibly, as Judge Feinberg suggests in New York State Broadcasters, some uncompensated promotional announcements outside the context of broadcast journalism might be found by the FCC to be promotional, and not news, and hence prohibited by 18 U.S.C. §1304. We need not decide that issue in this case." (Pet. App. 9a).

The issue before this Court can be narrowly perceived as whether Section 1304, to the extent it applies to a broadcaster's news judgment and programming, unconstitutionally punishes protected speech. However, the line between "news" and other programming is too fuzzy to be injected into constitutional adjudication. Compare Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973). Accordingly, this Court should affirm the ruling below, but should do so by holding that news programming and other journalistic judgments regarding "lottery information" cannot constitutionally be curtailed and thus that Section 1304's "lottery information" prohibition is void under the First Amendment.

I.

PETITIONERS' ARGUMENTS

Before attempting to analyze the legal issues, it is important to clarify the arguments advanced by petitioners. First, the Government does not rely upon differences between the print and the broadcast media as a rationale for finding that Section 1304 is constitutional. While claiming that "the peculiar characteristics of the electronic media" 10/ might justify a type of censorship which could not be applied to the print media, the Government specifically declines to rely on this argument. 11/

Second, although this Court, most recently in Pittsburgh Press, has developed a constitutional distinction between commercial and non-commercial speech, the Government maintains that this distinction is either meaningless or inapplicable here because certain information is inherently commercial and that any journalistic decision to cover such information as "news" cannot be garbed with "First Amendment immunity" (S.G.Br. 21).

10/ S.G.Br. 18, quoting from Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376, 387 (1973).

11/ "We do not . . . rest our submission entirely, or even principally, on the peculiar characteristics of the electronic media!" S.G.Br. 19.

Begging away the underlying question, the Government asserts that "[a]n editorial decision cannot of itself insulate material from otherwise legitimate governmental control" (Id.).

Third, the Government suggests that an activity need not violate the law for Congress to ban journalistic speech about it.12/ Rather, petitioners argue that "the constitutionality of legislation banning speech has little if anything to do with the legality of the connected activity. The dividing line is elsewhere" (S.G.Br. 20-21).

Fourth, the Government does not indicate where to draw the dividing line, nor does it suggest how to define that line with sufficient clarity to avoid the pitfall of vagueness. Instead, petitioners propose an "objective" test: "[g]iven an activity which government may properly discourage or outlaw . . . [is] the speech to be banned . . . promotional"? (S.G.Br. 23). 13/ Where

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12/ The record before the Court concerns information about legal state-run lotteries.

13/ This standard is explained as follows: "What matters is whether the communication must realistically be deemed an aspect of the activity sought to be controlled, or rather, a discussion or commentary upon it. For the First Amendment protects the exchange of "ideas" (Red Lion . . .), "debate" (New York Times v. Sullivan. . .), not mere words."

such a determination is made either legislatively or administratively, the Government contends that the Court's First Amendment inquiry is over and that the prohibition must be upheld. 14/

Amicus suggests that the history of governmental efforts at censorship is dotted with arguments substantially identical to those offered here by petitioners, i.e. that speech which is governmentally perceived as dangerous can be banned on that basis alone. Petitioners blithely urge this Court to abandon the requirement that before speech can be punished or restrained the government must demonstrate that it poses a "clear and present danger" 15/ of "inciting or producing imminent lawless action." 16/ This Court has never suggested, let alone held, that a general category of information, insofar as the media recognizes it as "news" can pose such a danger--and there is no reason to so retreat from the First Amendment in this case.

14/ Compare Marbury v. Madison, 1 Cranch 137 (1803).

15/ Schenck v. United States, 249 U.S. 47, 52 (1919).

16/ Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

II.

THE FIRST AMENDMENT PRECLUDES THE GOVERNMENT FROM PROHIBITING NEWS COVERAGE OF INFORMATION WHICH "PROMOTES" LOTTERIES.

A. The First Amendment Protects Broadcasters Serving a Journalistic Function.

In Pittsburgh Press, this Court stated that "[t]he durability of our system of self-government hinges upon the preservation of [press and speech] freedoms.

> '[S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern . . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.' Grosjean v. American Press Co., 297 U.S. 233, 250 (1936)." 413 U.S. at 382.

As the Court has recognized, the broadcast media serve an important journalistic function and as such operate as "the press" and are protected by the First Amend-

ment. 17/ While the scarcity of broadcast frequencies and the licensing scheme justified by that scarcity 18/ permits some governmental regulation of broadcasters which the First Amendment would not permit in the case of the print media, 19/ the First Amendment does not tolerate governmental intrusion into the journalistic discretion of broadcast licensees. 20/ Although regulations like the fairness doctrine and the candidate's "equal opportunities" requirement of Section 315(a) of the Communications Act, 47 U.S.C. §315(a), could not be imposed on the printed press, 21/ these regulations do not prohibit broadcasters from airing any type of information or opinion. They only

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17/ See Columbia Broadcasting System v. Democratic National Committee, supra, note 12 (cited hereinafter as "CBS"); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

18/ See National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

19/ See Miami Herald Publishing Co. v. Tornillo, 42 U.S.L.W. 5098 (June 25, 1974).

20/ See CBS, supra, and Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 387 (1969).

21/ Tornillo, supra.

require that if broadcasters air certain information they must also air other views. 22/

Perhaps because it is beyond dispute that broadcasters possess no less substantial First Amendment rights to choose and cover the news than other news media, the Government, as noted above, does not contend that the rationale for government regulation of broadcasting justifies a governmental imposition of greater news censorship on broadcasters than on other media. To the extent Section 1304 imposes a restraint on broadcasters' affirmative journalistic discretion which the government could not

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22/ Thus, this Court in Red Lion affirmed the existence of broadcasters' First Amendment rights while sustaining fairness doctrine requirements that broadcasters air all sides of important issues: "The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others." 395 U.S. at 387 (emphasis added).

23/ "For better or worse, editing is what editors are for; and editing is selection and choice of material." CBS, supra, 412 U.S. at 124.

constitutionally impose on newspapers or magazines, the statute is unconstitutional. 24/

Section 1304, as interpreted by the FCC and the Second Circuit, prohibits journalistic decisions to report as news information which "directly promotes a particular lottery." 25/ Such a restriction on any news medium clearly constitutes censorship and

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24/ In addition to banning lottery information, 18 U.S.C. §1304 also prohibits the advertising of lotteries; this latter part of law is not before the Court. Cf. Capitol Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972), affirming 333 F. Supp. 582, 584 (D.D.C. 1971); Larus & Brother Co. v. Federal Communications Commission, 447 F.2d 876 (4th Cir. 1971).

25/ New York State Broadcasters, supra, 414 F.2d at 997.

It is noteworthy that the instant case was triggered by a New Jersey radio station's desire to report to a New Jersey audience the results of the New Jersey State Lottery. This type of news coverage falls within the FCC's affirmative requirement that broadcasters cover important local issues:

is unconstitutional unless it falls within one of the exemptions to the First Amendment. Accordingly, we next examine these exemptions and indicate why none are applicable here.

The Congressional scheme of TV allocations is based on local outlets. See Sections 307(b), 303(s); S. Rept. No. 1526, 87th Cong., 2d Sess.. If a television station does not serve in a substantial manner as a local outlet . . . it is clearly not meeting its crucial role. In re Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming From the Comparative Hearing Process, 27 FCC 2d 580, 581 (1971).

Since a broadcaster best knows the particular needs and concerns of the community it serves, it bears the responsibility for devising programs and covering issues which are tailored to the specific community. In this case, a licensee made an editorial decision that since approximately 58% of the adult population in New Jersey purchases lottery tickets in an average week, the winning number(s) constitute "a bona fide news item" in which the public has a "keen interest." (Pet. App. 10)

B. News Coverage of Information About Legal Lotteries Does Not Fall Within Any Exception to the First Amendment.

We are here dealing "solely" with "speech"

> not [with] any separately identifiable conduct which allegedly was intended . . . to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence could be regulated without effectively repressing [First Amendment rights]. Cohen v. California, 403 U.S. 15, 18 (1971).

Accordingly, the first line of constitutional inquiry is into whether news reports about lotteries fall within any of the exceptions to the constitutional guarantees of free speech and press. 26/

1. Section 1304 is not a time, place or manner restriction. This Court has long recognized that the government may promulgate reasonable restrictions on the time, place or manner in which speech may

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26/ Since we are not here concerned with "conduct" which has speech elements or overtones, amicus does not discuss the mixed speech-conduct cases like United States v. O'Brien, 391 U.S. 367 (1968) and Adderly v. Florida, 385 U.S. 39 (1966).

be communicated. Thus, parade permits may be required, 27/ noisy sound trucks can be regulated, 28/ public sidewalks may not be obstructed, 29/ traffic may not be blocked, 30/ etc. However, where a forum is open to speech, "[s]elective exclusions . . . may not be based on content alone, and may not be justified by reference to content alone." Police Department of Chicago v. Mosley, 408 U.S. 92, 96 (1972). Since the "lottery information" ban of Section 1304 is based solely on content, it imposes impermissible censorship.

2. Where a forum like the broadcast media is entitled to First Amendment protection, this Court has held that not all

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27/ See, e.g., Cox v. New Hampshire, 312 U.S. 569 (1941).

28/ See, e.g., Kovacs v. Cooper, 336 U.S. 77 (1949).

29/ See, e.g., Cox v. Louisiana, 379 U.S. 536 (1965); compare Shuttlesworth v. Birmingham, 382 U.S. 87 (1965).

30/ See Cantwell v. Connecticut, 310 U.S. 296, (1940).

communications within that forum are entitled to such protection. Thus, obscenity 31/ is deemed to be of such little communicative worth that it is deemed to lie outside the zone of First Amendment protection. However, information about lotteries is not obscene.

3. Another form of speech which may be governmentally restrained is that which raises a "clear and present danger" of bringing about riot, assault, or other violent and/or plainly illegal results. Schenck v. United States, 249 U.S. 47, 52 (1919). Thus, "fighting words"--words which directly tend to provoke a physically violent reaction--may be punished or prevented. Chaplinsky v. State of New Hampshire, 315 U.S. 568, 573 (1941).

However, speech in the form of news coverage regarding a legal lottery, 32/ even where that speech "promotes" the lot-

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31/ Roth v. United States, 354 U.S. 476 (1957).

32/ Compare Pittsburgh Press, supra, which emphasized that want ads listed by sex are illegal and thus can constitutionally be prohibited.

tery 33/ creates no clear and present danger of violence or any other breach of the peace.

4. A type of communication which is entitled to less than full First Amendment protection is "commercial speech." 34/ This is the First Amendment loophole into which the Government seeks to place the ban on "lottery information."

There are at least two distinct types of "commercial speech" which have First Amendment significance: (1) advertising and (2) speech which is integrally part of a commercial scheme to defraud, swindle or otherwise injure the public. Since the Government argues that information tending to promote lotteries falls within both of these categories, amicus will examine each point in turn.

33/ The distinction between information which promotes a lottery and that which is legitimate news and has only incidental promotional effect is itself unconstitutionally vague. See discussion at Part C, infra, pp. 26-31.

34/ See Pittsburgh Press, supra; Breard v. Alexandria, 341 U.S. 622 (1951); and Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

A. Journalistic Coverage of Lotteries Is Not Advertising.

Pittsburgh Press defines the narrow contours of the commercial advertising exception to First Amendment protection of speech and press. First, commercial advertising is speech which does "no more than propose a commercial transaction," 413 U.S. at 385, or, in other words, which seeks to sell some goods or services. Id. at 383. 35/ Second, the Court explicitly distinguishes between "the selection of news stories" (413 U.S. at 385) by a commercial medium--even if such selection serves the commercial purpose of increasing the medium's revenues--and advertising, in which the advertiser, not the medium, is the speaker (Id. at 386); only advertising which proposes a commercial transaction constitutes "commercial speech." Third, the Court emphasizes the well-established principle that the First Amendment tolerates no governmental restrictions on the "content . . . [of] stories or commentary originated by" newspapers and other news media. Id. at 391. Fourth, labelling certain speech as "commercial advertising"

35/ Compare New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964), indicating that advertisements which do not serve a "purely commercial" purpose (Valentine, supra, 316 U.S. at 54) are not within the commercial advertising exception to the First Amendment.

does not thereby remove all First Amendment protection. In Pittsburgh Press the Court stressed that the advertisements in question promoted "illegal commercial activity" Id. at 388:

> . . . Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity. Id. at 389.

In seeking reversal in the instant case, the Government rides roughshod over this Court's carefully confined definition and analysis of commercial advertising and has the temerity to cite Pittsburgh Press for the following argument:

> "[C]ommercial" or otherwise unprotected speech cannot gain First Amendment immunity merely because it is labelled "news." An editorial decision cannot of itself insulate material from otherwise legitimate governmental control. (S.G.Br. 21).

Thus, the Government would have this Court, for the first time, replace the journalist's carefully guarded First Amendment

right to select and choose material 36/ with a governmental determination of which subject matter is not sufficiently newsworthy to warrant First Amendment protection. This not only makes a mockery of the Pittsburgh Press majority's carefully circumscribed definition of commercial advertising, but eviscerates the more fundamental First Amendment protection for the editorial judgment of print and broadcast journalists spelled out by this Court in such recent decisions as CBS, supra (all opinions), and Miami Herald Publishing Co. v. Tornillo, supra, as well as in Pittsburgh Press itself.

Equally misguided is the Government's reliance on Capitol Broadcasting Co. v. Acting Attorney General, supra. That decision holds no more than that commercial advertisements by cigarette manufacturers seeking to sell cigarettes fall within the First Amendment's commercial advertisement loophole and, accordingly, may be banned from radio and television.

The Government erroneously suggests that Capitol Broadcasting fails to distinguish between advertising in which the speaker is a commercial huckster, and news and other programming, in which the speaker is the broadcaster (S.G.Br. 19):

36/ CBS, supra, 412 U.S. at 118.

> "Nor do we suppose the result in Capitol Broadcasting would have been different if that case had involved a broadcaster who, for his own private or commercial reasons, had 'plugged' cigarette sales without direct sponsorship in defiance of a statute prohibiting such conduct."

However, Capitol Broadcasting clearly rejected this dangerous argument, basing its holding of statutory constitutionality on a finding that there is (333 F. Supp. at 584)

> "nothing in the Act or its legislative history which precludes a broadcast licensee from airing its own point of view on any aspect of the cigarette smoking question . . ." (emphasis added).

As Justice Stewart warned in his concurring opinion in CBS (412 U.S. at 146):

> "If we must choose whether editorial decisions are to made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom."

B. Journalistic Coverage of Legal Lotteries Is Not Commercial Fraud.

The Government's attempt to fit a ban on news "promoting" lotteries under the commercial fraud exemption to the First Amendment is totally without merit. In attempting to

argue that "illegality of the underlying conduct" is irrelevant to "the First Amendment inquiry," 37/ the Government cites four cases upholding statutes "which outlaw the use of the mails or interstate communications in furtherance of activities deemed injurious to the public but not elsewhere made illegal": Capitol Broadcasting Co. v. Acting Attorney General, 333 F. Supp. 382 (D.D.C. 1971), aff'd 405 U.S. 1000; Public Clearing House v. Coyne, 194 U.S. 497 (1904); Donaldson v. Read Magazine, Inc., 333 U.S. U.S. 178 (1948); E. F. Drew & Co., Inc. v. Federal Trade Commission, 235 F.2d 735 (2d Cir. 1956), certiorari denied, 352 U.S. 969 (1957).

With the exception of Capitol Broadcasting, which upheld a ban on non-fraudulent commercial advertising and is plainly inapposite, each case cited by the Government involved governmental bans of fraudulent or deceptive marketing practices. 38/ The ra-

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37/ S.G.Br. at 20. Compare Pittsburgh Press, 413 U.S. at 388, 389.

38/ Public Clearing House v. Coyne involved a scheme which, in the Court's words, "lacks the elements of a legitimate business enterprise . . . [N]o scheme of investment which must ultimately and inevitably result in failure can be called a legitimate business enterprise." 194 U.S. at 515; Donaldson v. Read Magazine, Inc. involved fraudulent marketing practices which this Court held to be "swindling schemes" which may be barred from the mails, 333 U.S. at 184; E.F. Drew

tionale of each case is that when speech or writing is an integral part of a fraudulent and therefore illegal commercial scheme, the speech itself can constitute criminal behavior which may be punished or barred from the media (S.G.Br. 20).

The record before the Court involves only information about legal lotteries broadcast not by the entity running the lottery but, rather, as news. Thus, there is no underlying illegality or fraud, no false marketing scheme, no swindle, no advertising. Accordingly, the commercial fraud exemption to the First Amendment is clearly irrelevant. 39/

C. The Distinction Between Information Promoting a Lottery and Legitimate News About a Lottery is Unconstitutionally Vague.

& Co., Inc. v. FTC, involved "false and misleading advertising" of oleomargerine which the advertiser claimed to be a "dairy product." 235 F.2d at 738.

39/ Cf. FTC v. Standard Education Society, 302 U.S. 112, 116 (1937), a case in which the Court, per Justice Black, upheld a false advertising ban, concluding that the sellers' practices were "contrary to decent business standards. To fail to prohibit such evil practices would be to elevate deception in business and to give to it the standing and dignity of truth."

Section 1304 is not vague on its face--it specifically prohibits "the broadcasting of . . . information concerning any lottery . . . or any list of prizes drawn or awarded . . . whether said list contains any part or all of such prizes." However, this statute is so plainly overbroad and violative of First Amendment rights that the FCC and the Second Circuit 40/ felt impelled to create the distinction between information promoting a lottery and legitimate news. This distinction, while designed to lift the statute out of the overbreadth trap, has placed it firmly in the constitutionally forbidden territory of vagueness.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."41/ In cases where a statute touches upon speech, the courts apply "stricter standards of permissible statutory vagueness." 42/ This is because a vague statute which "abut[s] upon sensitive areas of basic First

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40/ New York State Broadcasters, supra.

41/ Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

42/ Smith v. California, 361 U.S. 147, 151 (1959).

Amendment freedoms" 43/ "operates to inhibit the exercise of [those] freedoms." 44/

These principles demonstrate that the "lottery information" ban of Section 1304, as interpreted by the FCC and the Second Circuit in New York State Broadcasters, supra, is unconstitutionally vague for it fails to delineate with sufficient precision what constitutes "items having only limited news value that directly promote a lottery" 45/ and what, on the other hand, constitutes "ordinary broadcast journalism." 46/

Perhaps the best illustration that this distinction is impermissibly vague is its treatment, almost as an afterthought, at the conclusion of the Third Circuit's opinion:

> "[S]ome uncompensated promotional announcements outside the context of

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43/ Baggett v. Bullitt, 357 U.S. 360, 372 (1964), quoted in Grayned, supra, 408 U.S. at 109.

44/ Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961), quoted in Grayned, supra, 408 U.S. at 109.

45/ FCC Memorandum Opinion and Order, Pet. App. 21a.

46/ Id. at 21a.

> broadcast journalism might be found by the FCC to be promotional, and not news, and hence prohibited by 18 U.S. C. §1304. We need not decide that issue in this case. The announcements here involved are unadulterated broadcast journalism." Pet. App. 9a-10a.

The court below, in stating that some "promotional announcements" may be found to be "promotional," demonstrates that the "promotional" gloss to Section 1304 is so amorphous that it fails "to give fair notice of what acts will be punished" and what acts will not. Winters v. New York, 333 U.S. 507, 510 (1948).

Even the Second Circuit, which endorsed and refined the "promotional" gloss, concedes that the line between information which directly promotes a lottery and information which is true "news" about the lottery "may be thin." 414 F.2d at 997. 47/ The Second Circuit's own illustrations graphically illustrate just how thin that distinction really is:

47/ The petitioners here also admit that "there may be other cases in which it is difficult to separate promotional speech from idea communication once we apply Section 1304 to more than the pedestrian 'commercial.'" (S.G. Br. 23-24)

> [A]n announcement that a specified number of schools had been built with funds from the Lottery might generally 'encourage' the conduct of the Lottery, but we would not think it directly promotes it.

whereas,

> [I]f a lottery . . . announcement contains "news," such as the amount a lottery realized for education, it would nonetheless be banned. Id. at 998.

Another example of the ephemeral nature of the "promotional" gloss is a recent FCC decision involving the Maryland State Lottery. Letter to George P. Mahoney, 45 FCC 2d 491 (1974). The Commission there held that a broadcaster is promoting a lottery in violation of Section 1304 by airing weekly announcements reminding Maryland residents that there are many winners each week and indicating how to determine if a ticket is a winner, whereas Section 1304 does not prohibit a limited number of announcements broadcast a few times a year informing Maryland residents of large amounts of unclaimed lottery winnings and cautioning them to check any tickets they might hold. Id. at 492. The FCC itself conceded that

> [i]n the context of an ongoing lottery with weekly drawings such as Maryland's, it is difficult to distinguish between information related to a completed drawing and information related to, and possibly promoting, the lottery in general. Ibid.

The words and rulings of the Third Circuit, the Second Circuit, and the FCC all make clear that Section 1304, when read with the "promotional" gloss, is intolerably imprecise; and since "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms," NAACP v. Button, 371 U.S. 415, 438 (1963), that statute is unconstitutionally vague.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the judgment of the Third Circuit should be affirmed.

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